

ESTTA Tracking number: **ESTTA527549**

Filing date: **03/19/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91208325
Party	Defendant Raaka Chocolate Inc.
Correspondence Address	RAAKA CHOCOLATE INC. 50 LEXINGTON AVE APT 23A NEW YORK, NY 10010-2933 UNITED STATES ryan@raakachocolate.com
Submission	Other Motions/Papers
Filer's Name	Ryan D. Cheney
Filer's e-mail	ryan@raakachocolate.com
Signature	/Ryan D. Cheney/
Date	03/19/2013
Attachments	ApplicantRaakaChocolateIncsreplytoOpposersresponsetoApplicantsMotiontoDis miss-21413.pdf (7 pages)(367651 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

VIRGIN ENTERPRISES LIMITED, Opposer, v. RAAKA CHOCOLATE, INC., Applicant.	Opposition No.: 91208325 Mark: VIRGIN CHOCOLATE Serial No.: 85/489,294
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**APPLICANT RAAKA CHOCOLATE INC.'S REPLY TO
OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO DISMISS**

Raaka Chocolate Inc ("Applicant" or "Raaka"), Pro Se, hereby replies to Virgin Enterprises Limited's ("Opposer") response to Applicant's motion to dismiss.

I. Introduction

Rather than asserting that it actually has facts that it could allege in its Notice of Opposition from which the Trademark Trial and Appeal Board ("the Board") could determine that it is plausible that there is likelihood of confusion between Raaka's Chocolate's application for registration of its "Virgin Chocolate" Trademark and requesting leave to amend its Notice of Opposition to allege such facts, Opposer has merely reasserted and restated its bare claim that it (1) "... is the owner of prior registrations and applications for VIRGIN and VIRGIN-formative marks in connection with related goods and services and has used the VIRGIN mark in U.S. commerce in connection with chocolate, hot chocolate, and other related goods...;" (2) "it believes it will be damaged by the registration of Applicant's VIRGIN CHOCOLATE mark; (*emphasis added*)" and (3) merely alleges in conclusory terms likelihood of confusion and dilution of its trademark pursuant to provisions of the Lanham Act. Opposer's Response, pp. 2-3.

Because Opposer apparently does not present additional facts from which the the Board

could find a plausible claim for confusion or dilution, Opposer in its introduction misstates the current pleading standard, suggesting that the Board's standard, "...only requires an opposer to allege enough facts to give the applicant notice of its claims." Later, in its brief and response, Opposer acknowledges that the pleading standard subsequent to *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) has been elevated so that the Notice of Claim must allege facts from which the Board can determine the likelihood of confusion to be plausible. The same pleading standard, of course, applies to the claim of potential trademark dilution. Opposer also misstates the significance of the fact that Opposer does not own a federal trademark registration in International Class 30. Raaka has never contended as asserted by Opposer, "...that there is no likelihood of confusion because Virgin does not own a federal registration in International Class 30..." but rather has asserted that Opposer has not alleged that it owns a federal registration in International Class 30, and that:

"Given the fact that Opposer has failed to register any trademark in International Class 30, it becomes incumbent upon Opposer to allege at least some facts other than Raaka's use of the term Virgin in connection with its chocolate to create a plausible claim of confusion or dilution of its VIRGIN trademark."

Lastly, opposer misconstrues the thrust of Raaka's position that Paragraph 27 is inadequately pled inasmuch that Paragraph 27 as well as the rest of the Notice of Opposition is deficient as failing to plead any facts from which the Board can determine the plausibility of confusion, mistake, or deception regarding affiliation, connection, or association of Raaka's application of "Virgin Chocolate" with Opposer.

In sum, Opposer's Response has provided the Board with no additional facts and no arguments with respect to the facts as pled in its Notice of Opposition to support the plausibility of its claims of confusion and/or dilution.

II. Legal Standard

Opposer's exclusive reliance on *Fair Indigo LLC v. Style Conscience*, 2007 WL 4162785

(T.T.A.B. Nov. 21, 2007) is misplaced. Raaka certainly agrees that the Board should construe any allegations contained in Opposer's Notice of Opposition as true and even should construe the complaint in favor of the complaining party. But the standard stated in **Fair Indigo LLC v. Style Conscience**, *supra*, decided Nov. 21, 2007, has been superseded by the decision of the U.S. Supreme Court in 2009 in **Ashcroft v. Iqbal**, 556 U.S. 662. Opposer actually acknowledges the change in pleading standards resulting from **Iqbal** at p. 3 of its Response in citing **Zoba Int'l Corp. dba CD Digital Card v. DVD Format/Logo Licensing Corp.**, 2011 WL 1060727 (T.T.A.B. March 10, 2011), wherein application of the plausibility standard before the Board is in fact discussed. Specifically, **Zoba Int'l Corp. dba CD Digital Card** requires the Notice of Opposition to allege "enough factual matter to suggest that [a claim is plausible]" and 'raise a right to relief above the speculative level.' " Opposer's Response at p. 3. In fact, Opposer acknowledges that the Board has adopted the **Iqbal** standard in its own rules which opposer itself quotes: "To survive a motion to dismiss, a complaint must 'state a claim to relief that is plausible on its face.' " Id. at p. 3. This plausibility standard requires the pleading of some facts establishing plausibility of the Opposer's claim or claims to take a claim out of the orbit of mere speculation.

III. **Argument**

A. The Notice Of Opposition Is Deficient As The Board Cannot Determine The Plausibility Of Likelihood Of Confusion Or Dilution, Since The Notice Of Opposition Is Pled In Conclusory Fashion.

Not only has Opposer failed to register its VIRGIN mark in International Class 30, but it has also failed to allege how it has used its mark in connection with the sale and distribution of chocolate. Opposer's reliance on **Cunningham v. Laser Golf Corp.**, 222 F.3d 943 (Fed. Cir. 2000) is misplaced inasmuch as **Cunningham** was decided prior to **Iqbal** and only goes to the issue of standing and not adequacy of pleading in the context of **Iqbal**. Opposer's asserted "belief" that it is likely to be damaged by Raaka's registration of "Virgin Chocolate" is not

supported by any factual allegations as to what the basis of that belief is. Specifically, Raaka's use of "Virgin Chocolate" in commerce, which is a precondition for its application for registration of such trademark, has not been described in any allegation in the Notice of Opposition so as to permit the Board to determine the plausibility of likelihood of confusion or dilution. Nor has Opposer bothered to allege in its Notice of Opposition how Raaka uses "Virgin Chocolate" in support of its purported "belief" that it could be damaged. For example, Opposer has made no allegations concerning Raaka's website (www.RaakaChocolate.com), Raaka's packaging, or Raaka's channels or methods of sales and distribution. Thus, Opposer has deprived the Board of a basis for determining the plausibility that Opposer's belief that it may be damaged has any basis in fact.

Opposer also fails to allege in its Notice of Opposition how its own trademark actually is implicated, if at all, in its sale of chocolate, hot chocolate, and other chocolate products on its planes and in its waiting areas at airports. Does such chocolate carry a Virgin logo, have Virgin Packaging, or in any other way specifically implicate the VIRGIN trademark? The Notice of Opposition is utterly silent, containing no such allegations.

Similarly, Opposer's bare allegations of likelihood of confusion under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d), and dilution under Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c) provide the Board with insufficient factual allegations from which the Board, itself, can determine the plausibility of such claims.

B. Opposer's Failure To Register Its Mark In International Class 30 In Light Of *lqbal* Increases The Burden Upon Opposer To Plead Facts That Would Bar Raaka's Registration Of "Virgin Chocolate."

As stated in the introduction, Raaka has not argued that there was no likelihood of confusion because Opposer did not own a Trademark in International Class 30. However, in light of *lqbal*, Opposer's reliance upon *Jean Patou, Inc. v. Theon, Inc.*, 9 F.3d 971, 975 (Fed. Cir. 1993) fails to take into account the need to plead facts beyond merely having a registered Trademark in a

class other than the class relevant to Raaka's registration. Opposer must plead facts showing the plausibility of likelihood of confusion or dilution. **Patou** is a case decided on a full evidentiary record. In fact, in **Patou**, the applicant was attempting to register a trademark in the same class as opposer's trademark. The applicant was also attempting to register the same trademark in a class that the opposer had not registered. The court specifically looked at the facts establishing the likelihood of confusion and found such likelihood on what was a full evidentiary record in the **Patou** case. The quote used by Opposer in its Response at p. 4 does not alter Opposer's obligation to plead facts from which the Board within the four corners of the Notice of Opposition can determine that Opposer's claim of likelihood of confusion and/or dilution is plausible. **Patou** in fact supports the importance of having a registration conflict in the same class to support a claim of likelihood of confusion and/or dilution. The **Patou** court also noted that both the applicant and the opposer used the same channels of distribution for their products. The vague allegation that Opposer "...has used the VIRGIN Marks on and in association with the retail sale or distribution of chocolate, hot chocolate and other related goods" does not provide the Board with any sufficient factual predicate for determining the plausibility of actual confusion or dilution, even accepting as true such allegations.

Virgin Enterprises Ltd v. Steven E. Moore Opposition No. 91192733 (August 31, 2012) [not precedential] provides the Board with guidance of the types of facts that need to be pled to provide the Board with the ability to determine the plausibility of likelihood of confusion or dilution. The **Steven E. Moore** case was decided after development of an evidentiary record, and not on a motion to dismiss, as noted by Opposer in its Response. However, the **Steven E. Moore** case does show the type of factual issues that the Board takes into account in determining the plausibility of claims of confusion and/or dilution and highlights the fact that Opposer's Notice of Opposition is utterly devoid of any of the type of factual allegations that the Board might want to consider in determining whether or not Opposer's Notice of Opposition has any plausible

III. CONCLUSION

For the reasons stated above, Raaka respectfully requests that the Board grant its Motion to Dismiss. Raaka respectfully asserts that Opposer's opposition to its application for registration of "Virgin Chocolate" in International Class 30 is constructed solely around its incorporation of the word "Virgin" and nothing more. Such a claim is insufficient to plead a plausible likelihood of dilution or confusion of Opposer's trademarks, none of which are registered in International Class 30, and none of which have a direct association with chocolate. The Notice of Opposition's conclusory claims of likelihood of confusion and dilution remain entirely in the realm of speculation. Opposer's vague claim of use of chocolate goods in ill-defined association with its VIRGIN trademark in connection with airplanes and/or air-travel lounges do not as a matter of law meet the plausibility standard, which guides the Board in determining adequacy of pleading.

Dated: March 19, 2013

Respectfully submitted,

RAAKA CHOCOLATE, INC



By: _____
Ryan Cheney
Chief Executive Officer
Pro Se

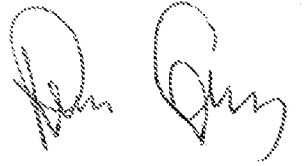
50 Lexington Ave - Apt. 23A
New York, NY 10010
(917) 340-2637

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss has been served upon NORVELL IP LLC, Attorneys for VIRGIN ENTERPRISES LIMITED, via first class mail, postage prepaid, addressed to:

SARAH E. DALE
NORVELL IP LLC
1776 Ash Street
Northfield, Illinois 60093

Dated: March 19, 2013



By: _____
Ryan Cheney
Chief Executive Officer, Raaka Chocolate

50 Lexington Ave - Apt. 23A
New York, NY 10010
(917) 340-2637